United States Court of Appeals

for the Second Circuit

APPENDIX

76-5009

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

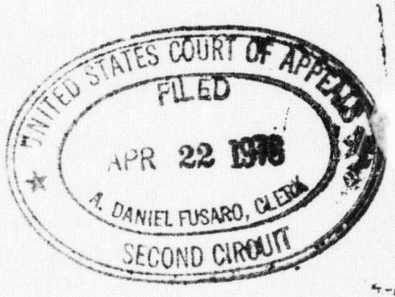
In the Matter :

-of- :

UNISHOPS, INC., :
MIDDLETOWN CENTER, INC., et al.,
:
Debtors.

In Chapter XI
73 B 1208

OPINION



APPEARANCES:

LEVIN & WEINTRAUB, ESQS.,
Attorneys for Debtors
225 Broadway
New York, New York
By: ELIAS MANN and
DANIEL A. ZIMMERMAN, ESQS.,
Of Counsel

RUBEN SCHWARTZ & SILVERBERG, ESQS.,
Attorneys for Claimants
143 Estates, Inc., et al.,
450 Seventh Avenue
New York, New York
By: SEYMOUR J. SILVERBERG,
ALBERT LYONS, and
MICHAEL GOLDSMITH, ESQS.,
Of Counsel

* * * * *

ROY BABITT, Bankruptcy Judge:

PAGINATION AS IN ORIGINAL COPY

The controlling facts have been agreed upon in this dispute between this Chapter XI debtor and one of its creditors on the proper legal basis to be accorded the three claims formally proved by that creditor. Those facts may be summarized as follows:

Whites at Middletown, Inc., owner-developer of property known as the Middletown Shopping Center located near Route 211, East Middletown, New York, executed a long-term lease with Middletown Center, Inc., as lessee on July 1, 1970. Between that date and September 24, 1970, Middletown Center Inc. became a wholly-owned subsidiary of Unishops, Inc. On September 24, 1970, claimant, 143 Estates, Inc., became fee owner of the Middletown Shopping Center. As a condition of its acquisition of the fee interest, 143 Estates, Inc. secured from Unishops, Inc. its guaranty of the July 1 lease between the latter's subsidiary, Middletown Center, Inc. and the former as successor lessor.

On November 3, 1973, the parent, Unishops, filed its petition for an arrangement pursuant to the statutory scheme of Chapter XI of the Bankruptcy Act, Sections 301

seq., 11 U.S.C. §§ 701 et seq., [1] In the intervening period between this filing and September 23, 1974, Unishops in no way altered, questioned, or sought to disaffirm its guarantee of its subsidiary's lease. The subsidiary, itself a petitioner for Chapter XI relief on September 3, 1974, remained in possession at least until that date. (Following September 3, the parties disagreed over the period including September 23, as will be seen.)

On September 3, Unishops's subsidiary, as lessee sent the keys to the claimant, as lessor, by mail with a covering letter manifesting an intent to give up possession and the lease. However, the property in question continued to be occupied by sub-lessees of Unishops' subsidiary from September 3 (when its Chapter XI petition was filed) until the 23rd, a period of twenty days. On

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1/ Unishops' petition was filed under Section 322, 11 U.S.C. §722, as an original petition as no prior proceedings under the Bankruptcy Act were pending. Compare Section 321, 11 U.S.C. §721.

September 23 this court entered an order authorizing disaffirmance of that lease pursuant to the terms of Section 313(1) of the Act, 11 U.S.C. §713(1). That order became final without review. However, the disaffirmance gave the claimant-lessor the right to file a claim based on that fact. In re Miracle Mart, Inc., 396 F.2d 62 (2d Cir. 1968)[2/] And so, claimant filed 3 separate claims. Two were filed against the parent, Unishops, and were assigned numbers 2304 and 2305 on this court's claims dockets; one was filed against the subsidiary involved in this dispute and was assigned number 3 on the claims docket relating to that debtor. Bankruptcy Rule 504(a), 411 U.S. 1055, applicable to Chapter XI cases by Rule 11-60, 415 U.S. 1037. This dispute centers on the propriety of those claims. They will be dealt with separately.

2/ In any event, claims in Chapter XI could be filed up to the order of confirmation, and under the circumstances described in Section 355(1), as amended in 1967, 11 U.S.C. §755(1), beyond that period.

In claim No. 2304 filed against Unishops, the claimant resists that debtor's efforts to denigrate the legal status of the claim and insists that rent owed it by Unishops' subsidiary from March 1, 1974 to September 23, 1974, a total of $417,000.47, is an administration expense of Unishops, as guarantor, pursuant to the guarantee agreement referred to above.

In claim No. 3 filed against the subsidiary, the claimant asserts that th unpaid rent from September 3 to September 23, 1974, $42,050.00, is an administration expense of the subsidiary, its lessee.

In claim No. 2305 filed against Unishops, claimant seeks rentals allegedly collected by Unishops in September, 1974. The difference between holding these claims to be entitled to administration status, as claimant urges, and something less, as the debtors assert, is real and meaningful. If the former, they must be paid in full on confirmation as incidents of the periods following the filing of the Chapter XI petitions by Unishops and later by this subsidiary. Section 337(2) of the Act, 11 U.S.C. §737(2),

and Rule 11-38(2), 415 U.S. 1028, read with Secti (6) and 361 of the Act, 11 U.S.C. §§757(6) and 761. I hing less, i.e., general claims, they share with other s ly placed creditors in the amounts promised in the arra s.

The issue thus presented to resolve the dis on claim No. 2304 is whether a guarantee of a lease i executory contract, which, never having been rejected the parent Unishops, as guarantor, pursuant to Section 11 U.S.C. §713(1), means that a claim based on such gua is a valid expense of the Chapter XI administration of Unishops' case and is therefore to be paid in full. Her the claim on Unishops' guarantee is grounded in the non-payment of rent by the subsidiary after Unishops filed its Chapter XI petition, but before the subsidiary filed its own and for 20 days after. Resolution of this question se to be squarely controlled by the continuing vitality of the holding of the Court of Appeals for this Circuit in In the Matter of Grayson-Robinson Stores Inc., 321 F.2d 500 (196 The instant dispute thus does not present a slate free of prior judicial instruction, and my duty as in inferior court

is to apply, as best I can, the legal gloss placed on identical facts by my superiors. See United States v. A Motion Picture Film Entitled "I am Curious Yellow," 404 F.2d 196 (2d Cir. 1968), Friendly, C.J., concurring at 200.

In Grayson-Robinson, as here, the parent guarantor executed a guarantee of its subsidiary's lease before the parent filed its Chapter XI petition but was called upon to make good on the subsidiary's default after the petition. There, as here, the subsidiary continued to operate under its lease during the period between its parent-guarantor's Chapter XI petition and its own subsequent petition for relief under that Chapter of the Bankruptcy Act. There, as here, the question presented to the Court of Appeals was whether or not a guarantee of a lease could be considered executory because of the guarantor's interest in the future performance of the lease by the independent subsidiary's lessor. En route to holding in the negative the court said:

> "The situation for which the statute provides [§313(1) disaffirmance of executory contracts] is one in which, in making a determination whether or not to reject, the advantages of giving and receiving further performance are to be

> weighed against the disadvantages. A guarantor of a lease has no interest in the lessor's future performance. Such an agreement of guaranty is not in and of itself any sort of the bargain. . . . The guarantor, by the lessor's execution of the lease, has received all of the consideration for which he bargained with the lessor." 321 F.2d at 504.

Hence, as this Circuit saw it in Grayson-Robinson, the crucial test was whether the Chapter XI debtor, as guarantor of the lease, retained any interest in the future performance by the lessor who insisted on the guarantee (the claimant here) where such interest was bargained for by the guarantor as part of the agreement of guarantee. The court in Grayson-Robinson seems to have minimized the realities of the independent interest which a guarantor would have in a lessor's future faithful performance of its lease with the subsidiary of the parent as lessee. This declination by the court to consider an independent interest of the guarantor beyond the mere bargained for guarantee agreement has been adversely commented on by Harvard Professor Vern Countryman in Part I of his Executory Contracts In Bankruptcy, 57 Minn. L.R. 439, 452-54 (1973). It would not, I think, be amiss for me to suggest a focus to the

problem which might, perhaps, support a reappraisal of Grayson-Robinson. That focus is on the inter-relationship between executory contracts and expenses of the Chapter XI administration as a super priority within the salutary purpose of that rehabilitative Chapter in the national scheme for business insolvency.

I start with the central theme of the Bankruptcy Act to secure equality among creditors and to prevent preferences between them. Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215 (1941); 3 Collier on Bankruptcy (14th ed.) ¶60.01. Expenses of the Chapter XI period are given priority under Section 337(2) of the Act, 11 U.S.C. §737(2), because "the cost of preserving the estate is in the interests of every creditor." In re Halsey Elct. Generator Co., 175 F. 825, (D.C.N.J. 1909) affirmed sub nom. State of N.J. v. Lovell, 179 F. 321 (3rd Cir. 1910); 3 Collier on Bankruptcy (14th ed.) ¶62.14. I do not mean to imply that only those expenses which preserve the estate are administration expenses. However, as will soon become apparent, preservation is the key element to an understanding of the status of the continued liability by

Chapter XI debtors under non-rejected executory cont
Such liability is given administration status. So muc
questioned.

Whatever may have been Congress' purpose in en
the provision for rejection of executory contracts, Sect
313(1), 11 U.S.C. §713(1), the legislative history carri
hint of it. In the Matter of Business Supplies Corp. of A
48 Amer. Bankruptcy L.J. 108 (S.D.N.Y. 1973). I can only a
that in writing Section 313(1), Congress was following a ru
already developed by judicial decision. The judicial origins
of the rule first grew out of the doctrine of abandonment,
Executory Contracts In Bankruptcy, supra, at 444. Under this
doctrine, the trustee was held not to be bound to accept
property which might prove to be onerous or unprofitable.
Donaldson v. Farewell, 93 U.S. 631, 634 (1876); Chaplin v.
Houseman, 93 U.S. 130, 135 (1876). This doctrine was extended
and gave equity receivers leave to reject unprofitable leases
and contracts. U. S. Trust Co. v. Wabash Western Ry., 130
U.S. 287, 299, 300 (1893). Simply stated, the receiver could
look at the executory contract as a potential asset which, if

found to be of no benefit, could then be abandoned, including the receiver's right to insist on performance by the other party. Since the right to insist on that future performance is property, an asset as it were of the estate, it makes sense to treat compliance with the terms of the contract by the Chapter XI debtor as an administration expense until disaffirmed under Section 313(1). Manifestly, if continued performance enhances the debtor, it is in the interest not only of the debtor, but also of all the creditors. The fact that the interest in future performance was not specifically bargained for does not make it any less an asset of the debtor; nor are the creditors' interests in the revitalizing debtor any less. Thus, the appropriate rule should take into account that an executory contract may be one in which the debtor has a continuing interest in its future performance, and that that contract is considered an asset of the debtor's estate which, unless disaffirmed under Section 313(1), requires performance by the debtor regardless of what was bargained for in the agreement.

An examination of the facts at bar demonstrates the

extent to which Grayson-Robinson, ignoring this focus, effectuates a result at war with settled principles of equity, which, we have been reminded again and again, is the touchstone of bankruptcy administration. Bank of Marin v. England, [illegible] U.S.99 (1966). The guaranteed lease here is clearly an asset of the subsidiary lessee. It cannot be less an asset of the parent guarantor. The parent surely has an interest in the future performance by the claimant, the lessor of the subsidiary's lease. Can it be said that Unishops, as parent, had no interest in its child's lease where that lease was a valuable asset of the child thereby contributing to its net worth? When, on March 1, 1974, the subsidiary lessee experiencing difficulty begins to default, the parent-guarantor's interest becomes apparent for its subsidiary continues to remain in possession of the Middletown Shopping Center, and continues to collect rents from its sub-lessees. That income, undiminished by payments of rent due the subsidiary's lessor, enhances the parent's assets. It simply cannot be accepted that the lessor (claimant here) would have permitted the subsidiary lessee to remain in possession and continue its defaults for six months were it not for the guarantee of the parent guarantor to make

the defaults good. In effect, then, Grayson-Robinson would permit a parent-guarantor to continue to derive the ultimate benefits of continued possession by its defaulting subsidiary based wholly on the lessor's reliance on the agreement of guarantee, but without responsibility to pay. It would be far more equitable to concede the parent-guarantor's interest in the future performance by the claimant lessor of its promises in the lease with the subsidiary. The guarantee should clearly be an executory contract within the meaning of Section 313(1) of the Act and in effect, until disaffirmed. That guarantee would therefore be a continuing obligation of the parent guarantor from its Chapter XI filing through its subsidiary's defaults, and until the guarantee agreement is disaffirmed. There is no prejudice to the parent's creditors. Rejection of the guarantee by the guarantor at the time of its subsidiary's default would not necessarily result in rejection of the obligation, for under Section 353 of the Act, 11 U.S.C. §753, a rejection puts the claimant in the position of general creditor for the damages resulting from the rejection. In re Miracle Mart, supra. On default by the subsidiary,

the parent-guarantor could make its election either to disaffirm or to continue the guarantee contract. The claimant, the subsidiary's lessor, should be allowed administrative expenses for allowing the defaulting subsidiary to remain in possession. Should the guarantee be disaffirmed, the lessor could proceed to recover the leased property from the defaulting subsidiary. If the subsidiary, unprotected by the parent's guarantee, should, therefore, file its own Chapter XI petition, as was done here, the landlord would still have certain remedies to recover the premises, see In re Overn, 510 F.2d 329 (2d Cir. 1975), or could assert a claim for unpaid Chapter XI use and occupancy and thereby become entitled to administration status.

The parent insists, however, that it should not be treated any worse than its subsidiary. Since, the argument runs, the claimant lessor has only a general claim against the subsidiary, as lessee, since the defaults predate the subsidiary's own Chapter XI petition, that claimant should not have a priority claim against the subsidiary's guarantor. The short answer to this contention is that the parent, as

guarantor has received a benefit following its Chapter XI for which it should pay administration expenses. That benefit consists of the undisturbed occupancy of the subsidiary. It is no answer to say that the defaults would be given general claim status it the subsidiary files its own petition for, the point is, the parent's guarantee may have the benign effect of making it unnecessary for the subsidiary to file. The difference in treatment results from the difference in position, and that difference may even survive bankruptcy under Section 16 of the Act, 11 U.S.C. §34.

A final word must be added about Grayson-Robinson. As the court itself appreciated there;

> "the question certified (is the guarantee of a lease an executory contract) is meaningless apart from the concretization based on the specific facts of the particular situation. In order to determine with confidence whether any particular contract is to be considered executory within the meaning of §313(1), we must know why the question is asked and what would be the consequences if the answer is "yes" or the answer is "no." 321 F.2d at 502.

The opinion goes on to comment on the scant record. 2/

Perhaps, a fuller record might have constrained the court to depart from the general rule that agreements of guarantee are non-executory, as in In re Schulte Retail Stores Corp., 105 F.2d 986 (2d Cir. 1939); and Hippodrome Bldg. Co. v. Irving Trust Co., 91 F.2d 753 (2d Cir. 1937), cert. denied, 302 U.S. 748 (1937). But those cases did not have the facts here involving a Chapter XI parent, and a defaulting subsidiary which later seeks the relief of that Chapter.

However the rule of Grayson-Robinson constrains me to hold that the agreement of guarantee is non-executory, and is a complete obligation effective on the date of execution. In the Matter of Wolf Rechtman, Bankrupt, 29 Am. B.R. (N.S.) 756, 760 (E.D.N.Y. 1935). Perhaps, the facts in the instant case will support a further look at the

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2/ It is surprising that the debtor Unishops does not press the apparently controlling effect of Grayson-Robinson even though its counsel was the counsel for the debtor in that case. The case is cited for the proposition that its rationale does not apply here, a reading which, I think, largely ignores what the court said and what the language implies.

question in light of the realities of these debtors and many like them. In any event, having been executed by the parent before it filed its petition, the guarantee can have no higher status than that of a general claim.

The claimant lessor, citing Maynard v. Elliot, 283 U.S. 273 (1931), gamely seeks to distinguish Rechtman by arguing in this case that, at the date of execution, the lease was not a provable claim under Sections 63a(8) and 57(d) of the Act, 11 U.S.C. §§103a(8) and 93d. The argument is without merit. Under Section 57(d) of the Act, contingent contractual liabilities are provable pursuant to Section 63(a)8 of the Act only if subject to liquidation or estimation. The question is for the sound discretion of the court, considering all the circumstances, taking into account particularly the probable direction of the process of liquidation as compared with the period of future uncertainty due to the contingency in question. 3 Collier on Bankruptcy (14th ed.) ¶63.60; Maynard v. Elliot, supra. The question then becomes a practical one. Here the contingent contractual liability resulting from the guarantee is capable of and in fact has

completely been set by the very claim interposed by the claimant for rent covering the period, March 1 to September 23, 1974. Such claim is provable and fixed as an obligation at the date of the execution of the contract. In re Rechtman, supra. Accordingly, Unishops' objection to claimant's classification of Claim No. 2304 as an administration claim is sustained. 3/

In examining Claim No. 3, the court agrees with the debtor that any claim for unpaid rent under a lease is an administration expense between the period of the Chapter XI filing and the disaffirmance of the lease, but only to the extent the debtor's estate is benefitted. Support is claimed for this in American Anthracite & Bituminous Coal Corp. v. Leonardo Arrivabene, 280 F.2d 119 (2d Cir. 1960).

Unishops' subsidiary argues with great vehemence, that its mailing of the keys to the claimant on September 3, 1974 constituted a voluntary acceptance by the latter of the

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3/ This decision calls for no more under Section 57k of the Act, 11 U.S.C. §93k, than the proper classification in law now; the parties have reserved the right to litigate later, if necessary, the quantum of the claim.

surrender of the premises. Therefore, the subsidiary goes on, it received no benefit for which it should be liable as an administration expense. On the facts here, however, the argument fails.

It is true that, generally, the voluntary acceptance of premises by a landlord is binding. So much is well settled under New York law, and the surrender of keys may indeed constitute such voluntary acceptance by the landlord, thereby terminating the lease. Zimmer v. Diamond, 52 N.Y. Supp. 2d 131, 268 App. Div. 539 (1944). However I do not find that, under the evidence here, the mailed keys were voluntarily received by the claimant, and, accordingly, the lease was not terminated on September 3, 1974 when Middletown Center, Inc. filed its own petition for Chapter XI relief.

Moreover, under New York law, the continued occupation of Middletown's sub-lessees must be considered continued occupation by Middletown as lessee. 214 W. 39th St. Corp. v. Miss France Coats, 84 N.Y.Supp. 2d 818, 274 App. Div. 597 (1948). But this excursion into New York law is

not really necessary to resolve a legal dispute on which both sides agree. However, the debtor presses the American Anthracite case to defeat the claim, and so I turn to it. No benefit actually inured to the debtor there for it had only the right to, but not actual possession. Here, Unishopss' subsidiary, as sub-lessor had actual possession through its sub-iessees who were liable to it for their occupancy. This right to collect the rents clearly constituted benefit and the rule of American Anthracite is satisfied. Accordingly, Claim No. 3 for the period from September (when Middletown's Chapter XI petition was filed) until September 23 (when the lease with claimant was rejected) is entitled to administration status.

Its quantum must now be fixed. Since I have been given no evidence by the subsidiary to the contrary, the rate of rental under its lease with claimant must be presumed to be reasonable; and the benefit conferred by the collection of sub-rents does not suggest otherwise. Palmer v. Palmer, 104 F.2d 161, (2d Cir. 1939), cert. denied, 308 U.S. 490 (1939), 4A Collier on Bankruptcy, (14th ed.) ¶70.44.

I therefore conclude that the claim based on the rent due claimant from Middletown Center, Inc., for the period from September 3rd to the 23rd, 1974 is to be given administration status. Of course, it follows, that that debtor is entitled to all rents due from the sub-lessees for this period. This is dispositive of Claim No. 2305 and the debtor's objection to that claim is sustained.

Submit order in conformity with this decision.

Dated: New York, New York
July 25, 1975

Bankruptcy Judge

SEE LETTER NEXT PAGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, N. Y. 10007

ROY BABITT
BANKRUPTCY JUDGE

July 31, 1975

Elias Mann, Esq.
Levin & Weintraub, Esqs.
225 Broadway
New York, New York 10007

Re: Unishops, Inc.
Middletown Center, Inc., et al.

Dear Mr. Mann:

This is to inform you that the court has become aware of two minor errors, which do not alter the results of its decision filed on July 25, concerning the above dispute. However, in order that the decision be free of even minor error, the court wishes to inform you that it has substituted a new page 7, on which there will be deleted on lines 11 and 12, the clause which reads as follows:

"and its own subsequent petition for relief under that Chapter of the Bankruptcy Act."

Also, the footnote on page 16 will have deleted from line 3 the clause, "the counsel for the debtor" and the word "involved" will be substituted.

Very truly yours,

Roy Babitt

Roy Babitt

cc: Ruben, Schwartz & Silverberg, Esqs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN THE MATTER :

OF :

UNISHOPS, INC., et al., : IN PROCEEDINGS FOR AN ARRANGEMENT

Debtors. : No. 73 B 1208 etc.

- x

MEMORANDUM

FRANKEL, D.J.

The undisputed facts and the legal issues are amply stated in the opinion of Bankruptcy Judge Babitt. It is feasible and appropriate, therefore, to record with relative brevity, and in the order of Judge Babitt's treatment, the grounds of affirmance on the major claim, reversal on the second, and a remand on the third.

1. Claim No. 2304. - The court agrees with Judge Babitt that, despite differences in nonessential detail, the explicit principles of In the Matter of Grayson-Robinson Stores, Inc., 321 F.2d 500 (2d Cir. 1963), control here. The resolution of this claim is directed by Grayson-Robinson's essential, and unhedged, holdings; first, that a contract of guaranty is not executory because it holds no future benefit for the guarantor, and, second, that special facts arising out of the guarantor's relationship to the lessee were of no moment. With deference in every direction, I am not

prepared to share the Bankruptcy Judge's reservations about that decision. It is by no means self-evident that a lease of a nonbankrupt lessee, which is not able to disaffirm, is an asset of that lessee itself, let alone an asset of a guaranteeing parent corporation. It is not more evident that the claimant-lessor allowed the subsidiary to remain in possession, though in default, upon the strength of the disputed contract of guaranty - surely a strange course of forbearance in light of the guarantor's presence in the bankruptcy court under the seemingly ample shadow of the Grayson-Robinson precedent. Despite the references to "equitable principles" and contrary views of a respected academic commentator, it is not clear at all that the decision in Grayson-Robinson fails to assess accurately and justly the claims of competing creditors.

In any event, along with Judge Babitt, and upon his sound analysis of what the case must be deemed to have held, I conclude that Grayson-Robinson commands rejection of Claim No. 2304.

2. Claim No. 3. - In determining this claim, the Bankruptcy Judge did not have the benefit of two pertinent decisions, one dated a day before, the other a month or so after, Judge Babitt's opinion. Under older precedents it was arguable that a debtor-in-possession

should not be deemed an occupant of premises because they are held by subtenants under a sublease made before the Chapter XI proceeding. See Central Manhattan Properties v. D.A. Schulte, Inc., 91 F.2d 728 (2d Cir. 1937); In re McCrory Stores Corp., 69 F.2d 517 (2d Cir. 1934); In re United Cigar Stores Co., 69 F.2d 513 (2d Cir. 1934); Irving Trust Co. v. Densmore, 66 F.2d 21 (9th Cir. 1933); Meehan v. King, 54 F.2d 761 (1st Cir. 1932). For, even before last year, it appeared that a decisive separation was affected by entry into Chapter XI, whereupon the debtor-in-possession is to "have all the title and exercise all the powers of a trustee . . . ." Bankruptcy Act §342, 11 U.S.C. §742 (1970); see American Anthracite & Bituminous Coal Corp. v. Leonardo Arrivabene, S.A. 280 F.2d 119, 124-25 (2d Cir. 1960); Central Manhattan Properties v. D.A. Schulte, Inc., 91 F.2d 728, 729 (2d Cir. 1937). But if there was a missing link in the chain of reasoning to that conclusion, it was supplied when, in circumstances more perplexing for this point than are the facts of this case, the Second Circuit affirmed that "[a] debtor-in-possession under Chapter XI . . . is not the same entity as the pre-bankruptcy company." Shopmen's Local Union No. 455, etc. v. Kevin Steel Prod., Inc., 519 F.2d 698, 704 (2d Cir. 1975). Consequently, contracts of the pre-bankruptcy entity are not contracts of the debtor-in-possession, until or unless assumed. Id. at 704. Within weeks, another panel, in an

analogous case, reaffirmed the character of a "debtor-in-possession . . . as a new judicial entity." Brotherhood of Railway, etc. v. REA Express, Inc., 523 F.2d 164, 170 (2d Cir. 1975), cert. denied, 44 U.S.L.W. 3344 (1975).

In sum, as the precedents now stand, it seems plain that Claim No. 3 should be disallowed, as occupation by a sublessee of a debtor is not to be construed as occupation by the debtor-in-possession.

3. Claim No. 2305. - The decision below on Claim No. 3 made it unnecessary to reach this remaining subject. In the changed posture, it may require another look, though this is probably of no consequence. It is apparently conceded that Unishops collected no rents from sublessees in the period from September 3 to September 23, 1974. Moreover, the claimant's entitlement to rents thereafter from the sublessees is proclaimed in Judge Babitt's order of the latter date allowing Middletown to disaffirm. Nevertheless, insofar as there may be open questions on this topic not now disclosed in the record, these are left for handling by Judge Babitt on the remand.

In sum, the decision below is affirmed as to Claim No. 2304, reversed as to Claim No.3, and remanded on Claim No. 2305 for further proceedings if any

should be required.

It is so ordered.

Dated, New York, New York
January 29, 1976

U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In the Matter

-of-

UNISHOPS, INC.,
UNISHOPS OF STAPS, INC.,
UNISHOPS OF MODELL'S, INC.,
UNISHOPS OF CLARKINS, INC., also
d/b/a CLARK WHOLESALE CO.,
GOLDFINE'S, INC. also d/b/a
GOLDFINE'S "BY THE BRIDGE",
NESCOTT, INC.,
TERIL STATIONERS, INC.,
J.Z. SALES CORP.,
CENTRAL TEXTILE, INC., formerly
known as UNISHOPS OF CENTRAL
TEXTILE, INC.,
BOBBIE SUE, INC., also doing
business as FAMOUS FASHIONS,
PERRY'S SHOES, INC., also doing
business as PIC 'N SHOE,
WHITE DEPARTMENT STORES, INC.,
formerly known as WHITE AT
MASSAPEQUA, INC.,
UNIQUIP, INC.,
UNISHOPS OF GIANT AUTOMOTIVE, INC.,
SICKELS-LODER, INC.,
MODELL'S SHOPPERS WORLD OF TRENTON, INC.,
CLARKINS AT YOUNGSTOWN, INC.,
MODELL'S SHOPPERS WORLD OF EAST
BRUNSWICK, INC.,
MIDDLETOWN CENTER, INC.,
WHITE SHOPPING CENTER, INC.,

Debtors.

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In Proceeding
for an
Arrangement

No. 73 B 1208

AGREED STATEMENT
OF FACTS

Agreed Facts

TO THE HONORABLE ROY BABITT, BANKRUPTCY JUDGE:

The undersigned are, respectively, movants and respondent to the debtors' motion to expunge or reclassify claims No. 3, 2304 and 2305. The following constitutes their agreed statement of the operative facts in connection

with the issues raised by said objections and so stipulated solely for the purposes of this motion and any appeals (subject to their relevance as determined by this Court)

1. As to each said claim objected to, the debtors seek to reclassify the claims on the grounds that they are not administration expense claims, and to reduce for excessiveness.

2. The realty in question in each instance is a 19.707 acre parcel of developed realty in the Township of Walkill, Orange County, New York; otherwise known as Middletown Shopping Center and situated near Route 211, East Middletown, New York.

3. On or about September 24, 1970 the claimants in question acquired the fee interest in said parcel for the price of 4 million dollars.

4. The parcel itself had been acquired in fee by Whites At Middletown Inc. in May 1969. The corporation was formed to acquire such parcel. Said corporation's stock was wholly owned by White Department Stores Inc. (formerly known as White At Massapequa Inc), the capital stock of which was owned by Murray Nemeroff. Middletown Center Inc. was formed, likewise as a wholly owned subsidiary of White Department Stores Inc., to take a lease to the parcel. It was contemplated that the parcel would be developed as a shopping center in which a Whites Department Store as well as a supermarket, a bank and other sublessees or licensees of Middletown Center Inc. would operate.

5. A long term lease for the entire parcel was executed, effective as at July 1, 1970, by and between fee owner-developer Whites At Middletown Inc. as landlord and operator Middletown Center Inc., as tenant. A copy thereof is annexed hereto and the Court is respectfully referred to same for its proper meaning, force and effect.

6. On or about June 25, 1970 the capital stock of Whites At Middletown Inc. was dividended out to Murray Nemeroff. On or about July 1, 1970 said Mr. Nemeroff sold his capital stock in the aforesaid parent holding company, White Department Store Inc. to Unishops, Inc. Between July 1970 and September, 1970 the fee interest therein was deeded to Murray Nemeroff individually. As at September 24, 1970 tenant Middletown Center Inc. was a wholly owned subsidiary of White Department Stores Inc. which was by then in turn, a wholly owned subsidiary of Unishops Inc.

7. The transfer of the fee to the realty in question, to the claimants herein, on or about September 24, 1970, was made subject to both the then existing lease of July 1, 1970 and any subleases and/or licenses as such tenant had or would thereafter make; without requiring consent on the part of claimants. A copy of the Deed is annexed hereto. The Court is respectfully referred to same for its proper meaning, force and effect.

8. As part of the bargained for inducement to claimants to purchase the fee interest in question, they were simultaneously given a guarantee in writing of the lease obligations of tenant Middletown Center Inc., made by its then parent, Unishops Inc., together with an opinion letter of the said guarantor's special counsel. Copies of the two said documents are annexed hereto. This Court is respectfully referred to same for their proper meaning, force and effect.

9. Claimants aver, which the debtors cannot controvert (and claimants will prove if so required by this Court) that they have never attorned to any sublessee or licensee of tenant, debtor Middletown Center Inc., to the date hereof, whether by acceptance of rental charges or otherwise.

10. On November 30, 1973, debtor Unishops Inc. filed its petition and commenced its Arrangement proceeding herein.

11. Between such filing and September 23, 1974, an interval of ten consecutive months while Unishops Inc. remained debtor-in-possession, no change in status, of either the aforesaid lease or of the aforesaid guarantee, was effected either by conduct (of lessee Middletown Center Inc., guarantor Unishops Inc., or the claimants) or by operation of law.

12. That subsequent to February 1974, no further rent reserved or other charges due, were paid to claimants by or on behalf of lessee Middletown Center Inc. Payment on the check tendered and payable to claimants' agent Urban Management, for the March 1974 minimum rent was stopped. A copy thereof is annexed hereto.

13. On or about March 13, 1974 White Department Stores Inc. sent a letter to claimant's, a copy of which is annexed hereto. This Court is respectfully referred to same for its proper meaning, force and effect.

14. The debtors aver, which claimants cannot controvert (and debtors will prove if so required by this Court) that they have neither demanded nor have they received any money for occupancy under sublease or license in connection with the parcel in question, with the possible exception of a March 5, 1974 payment from Waldbaums; that a proposed sum by way of full settlement of sublease obligations as between the debtors and Waldbaums was tentatively agreed upon but never performed.

15. On September 3, 1974, lessee-debtor Middletown Center Inc. filed its petition and commenced its Arrangement proceeding herein. That no substantive consolidation of the Arrangement proceedings of guarantor Unishops Inc. (73 B 1208) and of lessee Middletown Center Inc. (74 B 1245) has ever taken place.

16. That simultaneously with such filing on September 3, 1974 the keys to that building on the parcel occupied by Middletown Center Inc. was mailed to claimants. A copy of the covering letter is annexed hereto. This Court is respectfully referred to same for its proper meaning, force and effect. The keys to the building housing lessee's subtenant, Chemical Bank was not tendered.

17. Debtors aver, which claimants cannot controvert (and debtors will prove if required to do so by this Court):

(a) That subsequent to March 30, 1974 the White Department Store no longer conducted active business operations for the sale of its stock-in-trade nor did it maintain any merchandise inventory thereat;

(b) An auction of the fixtures in the department store building was conducted on or about March 26, 1974 with terms of removal by March 30, 1974.

18. Claimants aver, which debtors cannot controvert, (and claimants will prove if required to do so by this Court) that equipment of debtor Middletown Center Inc.'s subtenant Waldbaums was not removed from the White's building as of end of July, 1974.

19. The department store building was vacated and broom clean as of September 3, 1974 the date of filing of the Chapter XI. Tje subtenant of Middletown Center Inc. Chemical Bank - Tappan Zee branch, continues to

occupy and operate its business on the parcel leased by debtor Middletown Center Inc., to the date hereof.

20. By notice of motion dated September 6, 1974 and filed with this Court, the debtors moved to reject the lease dated July 1, 1970. The said bank subtenant was neither made a co-respondent, nor was it served with a copy thereof.

21. On September 23, 1974 this Court entered an Order respecting the said lease effective as of September 23, 1974. A copy thereof is annexed hereto. This Court is respectfully referred to same for its proper meaning, force and effect. The aforesaid subtenant in possession was not served with a copy thereof.

22. Claimants appeared on the said motion by attorneys DEMOV, MORRIS, LEVIN & SHEIN. A copy of the affidavit in opposition to the motion of Stephen H. Shane, Esq. is annexed hereto.

23. Since the filing of its petition herein, debtor Middletown Center Inc. has taken no affirmative steps to collect any of the rental or other charges due to it from Chemical Bank or its other subtenants and/or licensees for the month of March 1974 et seq.

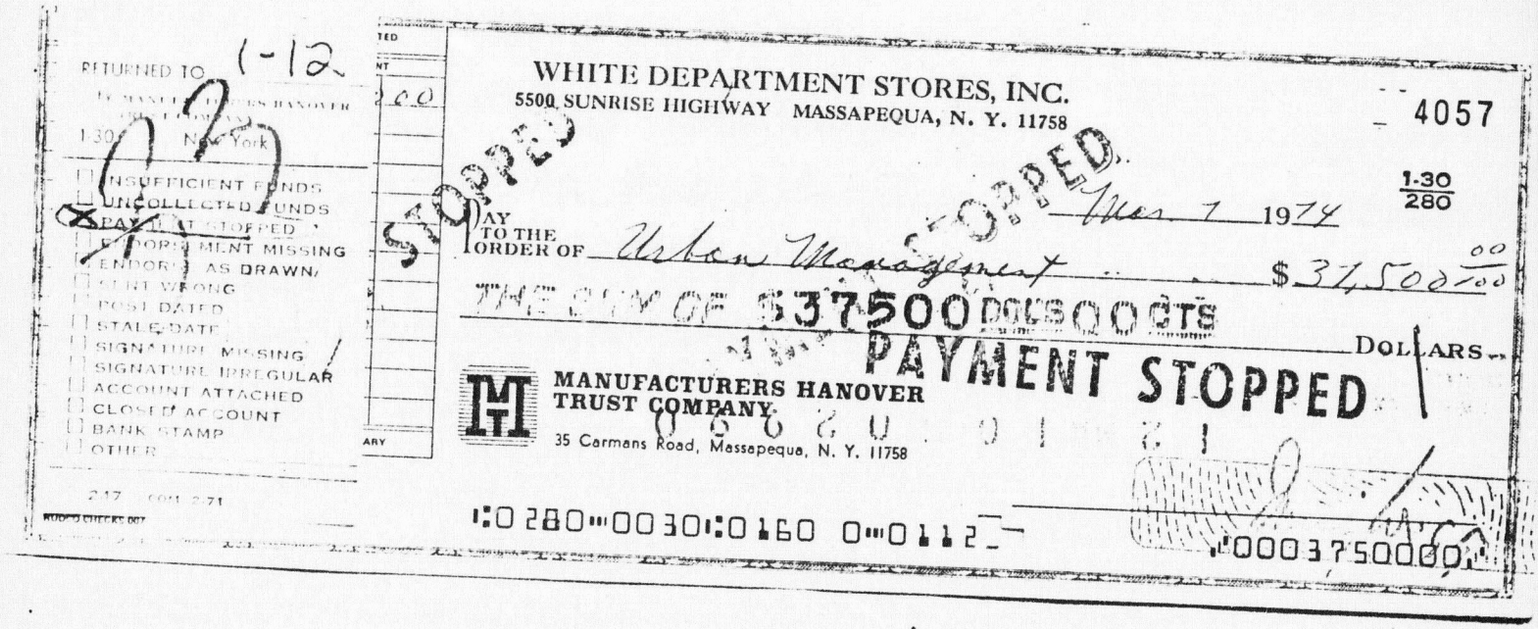
24. Since the disaffirmance of the lease between claimants and Middletown Center Inc. by Order dated September 23, 1974, claimants have taken no affirmative

steps to disaffirm the sublease or oust subtenant Chemical Bank-Tappan Zee branch from possession.

Dated: New York, New York
April 25, 1975.

Elias Mann
attorney for debtors

Benjamin Miller
agent for claimant respondents



RETURNED TO 1-12

INSUFFICIENT FUNDS
UNCOLLECTED FUNDS
PAYMENT STOPPED
ENDORSEMENT MISSING
(ENDORSE AS DRAWN)
SENT WRONG
POST DATED
STALE DATE
SIGNATURE MISSING
SIGNATURE IRREGULAR
ACCOUNT ATTACHED
CLOSED ACCOUNT
BANK STAMP
OTHER

217 COM 2-71

WHITE DEPARTMENT STORES, INC.
5500 SUNRISE HIGHWAY MASSAPEQUA, N. Y. 11758

4057

1-30
280

STOPPED

Dec 7 1974

PAY TO THE ORDER OF Urban Management $37500 00

THE SUM OF 37500 DOLLARS 00 CTS

Dollars

PAYMENT STOPPED

MANUFACTURERS HANOVER TRUST COMPANY
35 Carmans Road, Massapequa, N. Y. 11758

⑆0280⑈0030⑆0160 0⑈0112

⑈0003750000⑈

See paragraph 12 of Agreed Statement of Facts.

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

WHITE DEPARTMENT STORES INC.
5500 SUNRISE HIGHWAY - MASSAPEQUA, N.Y. 11758 - (516) 541-4600

March 13, 1974

Mr. Benjamin Miller
c/o Urban Management
111 Broadway
New York, New York

Dear Mr. Miller:

As you are aware from your prior conversations with Messrs. Berger and Breslin, we are planning to close the White Middletown store upon completion of the Going Out of Business Sale launched on February 28, 1974. We expect to make the premises available to you by March 31, 1974 and will turn over the keys to you at that time. The utilities, security and alarm services operating in the store will be advised to discontinue their services in the name of White's as of March 31, 1974. We are asking them to transfer the billing for any ongoing services to yourself or to whomever you designate.

The Creditors' Committee for Unishops has asked that we discontinue the payment of rent on closed stores but has authorized us to negotiate with the landlords of closed units for a release from any further obligation for the property in exchange for our turning over the property to the landlord with all furniture and fixtures owned by Unishops plus the payment of two months rent and taxes.

Please know we regret the need to sever our relationship. We are asking Mr. Breslin to intensify his efforts to secure replacement tenants for the property and assure you of our desire to cooperate in any way that circumstances permit. We shall be happy to meet with you promptly if you are interested in the offer authorized by the Creditors' Committee.

Sincerely,

WHITE DEPARTMENT STORES, INC.

Irving Wiggs
President

IW:jgs
cc: Harold Share
Jerome Zelin
Herman Greitzer
Paul Berger
Wilbur Breslin

See paragraph 13 of Agreed Statement of Facts.

GUARANTY 17

This is a Guaranty dated and executed this 24th day of September 1970 by Unishops, Inc., a New York corporation (hereinafter called "Guarantor"), to 143 Estates Inc., Nassau Estates Inc., and Construction and Development Corp. of New York Inc.

Purchaser and its respective successors and assignees (hereinafter called "Purchaser")

This Guaranty is made with reference to the following facts: Middletown Center Inc., a New York corporation (hereinafter called "Lessee") has entered into a lease dated as of the 1st day of July, 1970 a copy of which is annexed and marked "Exhibit A" (hereinafter called the "Lease"), pursuant to which Landlord therein has leased to Lessee certain real property and improvements therein more particularly described. Guarantor is the owner of all of the issued and outstanding shares of the capital stock of Lessee and the property is being bought on the condition that Guarantor shall execute and deliver this Guaranty.

NOW, THEREFORE, in consideration of the premises and of other good and valuable consideration, receipt of which is hereby acknowledged, Guarantor does hereby absolutely and unconditionally guarantee the following:

Guaranty

(a) The due and prompt payment by Lessee of all payments to be made by Lessee pursuant to the terms and provisions of the Lease; and

(b) The due and prompt performance by Lessee of each and every obligation of Lessee under the Lease and all other instruments executed and delivered by the original Lessee or by Guarantor pursuant to the Lease, this Guaranty, or otherwise.

The obligations hereunder are independent of the obligations of Lessee, and separate action or actions may be brought and prosecuted against Guarantor whether or not action is brought against Lessee, and whether or not Lessee be joined in any such action or actions, and without notice to or demand upon Lessee. Nothing contained herein shall preclude the Guarantor from asserting in any such action or actions

any defenses that would be available to the Lessee except those expressly waived by Guarantor hereunder. Guarantor agrees that at this time the Lease is valid and subsisting and in full force and effect and that there are no defenses, offsets or counterclaims to any of the provisions thereof on the part of the Lessee or Guarantor or either or both. Guarantor, without notice to or demand upon it, and without affecting its liability hereunder, hereby gives consent to Purchaser to (a) extend, modify or otherwise change the time for payment of any monies payable by Lessee under the Lease; and (b) any act of Purchaser which alters in any respect the obligations of Lessee under the Lease or which impairs or suspends the remedies or rights of Purchaser against the Lessee with respect to said obligations.

Purchaser agrees, anything herein to the contrary notwithstanding, for itself and its successors and assigns that (a) before instituting any action against Guarantor based on this Guaranty, it will deliver or mail to Guarantor written notice of the existence of a default under the Lease and allow Guarantor ten days after receipt of such notice (but in no event less time than Lessee would have under the terms of the Lease had such notice been given on the date of the occurrence of the default) within which Guarantor may remedy such default, and (b) will not cancel or terminate the Lease by reason of any default of Lessee thereunder without first delivering or mailing to Guarantor written notice of the existence of such default and allowing ten days after receipt of notice (but in no event less time than Lessee would have under the terms of the Lease had such notice been given on the date of the occurrence of the default) within which Guarantor may remedy such default. Purchaser may proceed directly and at once, without further notice or demand, against Guarantor and may enforce and pursue against Guarantor any and all remedies which Purchaser may have, as Lessor, against Lessee under the terms of the Lease.

Guarantor waives any right to require Purchaser to (a) proceed against, give notice to, or make demand upon Lessee; (b) proceed against or exhaust any security held by Purchaser from Lessee, or (c) pursue any other available remedy. Guarantor further waives any defense arising by reason of any cessation of liability on the part of Lessee as a result of any voluntary or involuntary bankruptcy, or other insolvency proceeding involving Lessee. Except as otherwise provided in the paragraph immediately preceding, Guarantor waives all presentments, demands for performance, notices of non-performance, protest, notices of protest, notices of dishonor and notices of acceptance of this Guaranty, and of the existence, creation or incurring new or additional indebtedness pursuant to the Lease and other agreements executed by original Lessee or Guarantor. The failure to exercise or delay in exercising any right, power, or remedy hereunder or under the Lease shall not impair any right, power or remedy which Purchaser may have, or be construed to be a waiver of any thereof or an acquiescence in any breach or default hereunder; nor shall any waiver of any default of Guarantor be deemed to be waiver of any default or breach subsequently occurring.

The obligations of Guarantor hereunder shall continue until the expiration of the Original Term of the Lease as defined in the Lease and for such further term as the Lessee in possession or entitled to possession according to the terms of any assignment or assignments under the Lease shall be a subsidiary of Guarantor and for any period as to which the Lease is extended by reason of a change in Certificate of Occupancy in accordance with Section 6.02 of the Lease Guarantor agrees that the validity of this Agreement and its obligations hereunder shall in no wise be terminated, affected or impaired by reason of the assertion, or failure to assert, by the Purchaser or Landlord of any of the rights or remedies reserved to Landlord pursuant the provisions of the Lease.

their agreed statement of the operative facts in connection

Nothing herein contained shall directly or indirectly, expressly or impliedly, subject, or be deemed to subject, Purchaser to any liability to Guarantor for damages or otherwise for failure of Purchaser or Landlord to give to Guarantor (i) any notice herein provided for (ii) notice of breach or default of any term, covenant or condition of the Lease by Lessee, or (iii) notice of failure on the part of Lessee to observe, keep or fulfill any term, covenant or condition on the part of Lessee to be performed pursuant to the Lease; and nothing herein contained shall relieve or be deemed to relieve Guarantor from its liability to Purchaser and its obligations hereunder for failure of Purchaser or Landlord to give to it notices hereunder. Notwithstanding any provisions of this Agreement or law to the contrary, Guarantor agrees it shall not be released from any of its obligations hereunder or otherwise by operation of law; and further agrees the only way it may or can be released from its obligations is by full and complete performance by it or the Lessee or by both of all the terms, covenants and provisions of the Lease on the part of the Lessee to be performed for the period of the Guarantor's obligations as set forth in the next preceding paragraph The provisions of the paragraph dealing with notice to Guarantor prior to institution of an action or cancellation or termination of the Lease are requirements merely precedent to commencement of any action and as a period during which Guarantor may cure defaults as therein provided. Failure of Purchaser to give the notices provided in that paragraph shall not release Guarantor from any liability hereunder.

Guarantor represents and covenants that Lessee is now a subsidiary of Guarantor and shall be conclusively presumed to be a subsidiary of Guarantor until Landlord is notified to the contrary. Any requirement of notice to Guarantor shall only be applicable in the event that the Lessee in possession or entitled to possession is not a subsidiary of Guarantor. A subsidiary shall be an entity in which Guarantor

All rights and powers under this Guaranty shall inure to the benefit of Purchaser, its successors and assigns (including, but not limited to, any party which succeeds Purchaser as Lessor under the Lease), and any lender who loans funds to Purchaser. Guarantor agrees to execute and deliver any document reasonably requested by Purchaser evidencing that the rights and powers of Purchaser under this Guaranty inure to the benefit of others having a direct interest in the performance of the Lease obligations.

IN WITNESS WHEREOF, Guarantor has executed this Guaranty as of this 24th day of September, 1970.

UNISHOPS INC.

Seal

By Bernard Kaufman

CHAIRMAN of the Board
AND President

ACKNOWLEDGEMENT
ATTACHED
TO ORIGINAL

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐ Certification By Attorney — certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation — shows: deponent is the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.
Dated:

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

Check Applicable Box

☐ Individual Verification — being duly sworn, deposes and says: deponent is the in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ Corporate Verification — the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

.....
The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at

Check Applicable Box

☐ Affidavit of Service By Mail — On 19 deponent served the within upon attorney(s) for in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service — On 19 at deponent served the within upon herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on 19

.....
The name signed must be printed beneath

NOTICE OF ENTRY

Sir:-Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

RUBEN SCHWARTZ & SILVERBERG

Attorneys for

Office and Post Office Address

450 Seventh Avenue

NEW YORK, N. Y. 10001

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

RUBEN SCHWARTZ & SILVERBERG

Attorneys for

Office and Post Office Address

450 Seventh Avenue

NEW YORK, N. Y. 10001

To

Attorney(s) for

Index No. Year 19

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT Docket No. 76-5009

In the Matter of
UNISHOPS, INC., et al

Debtors

143 ESTATES, et al

Appellants

-against-

UNISHOPS, et al

Appellees

PARTS OF RECORD RELIED ON BY APPELLANT

RUBEN SCHWARTZ & SILVERBERG

Attorneys for Appellants

Office and Post Office Address, Telephone

450 Seventh Avenue

NEW YORK, N. Y. 10001

OXford 5-3550

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

255p

COPY RECEIVED
Date 4/22 19 76
LEVIN & WEINTRAUB
Attorneys for Debtors